NO. 43217-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

RESPONDENT,

v.

SHAW C. SEAMAN

Appellant

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable James W. Lawler, Judge

APPELLANT REPLY BRIEF

Shaw C. Seaman

Appellant
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A. ARGUMENT

1. DRIVING "APPROXIMATLEY 70 MILES PER HOUR" DOWN A VACANT HWY 12 AT 9PM FOLLOWED BY A HURRIED EXIT, IN LIGHT OF THE CIRCUMSTANCES AND CONDITIONS, IS INSUFFICIENT EVIDENCE TO PROVE WILLFULL INTENT TO ELUDE A PURSUING POLICE VEHICLE.

The Attempting to Elude a Pursuing Police Vehicle statute describes eluding as a driver "...who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle,..." **RCW 46.61.024**.

Mr. Seaman concedes one could successfully argue that his spontaneous decision to hurriedly pull his vehicle completely off the roadway after seeing a speeding truck in the distance behind him was ill conceived. Irrespective of circumstances, hours on the road, exhaustion etc. it's a snap second decision Mr. Seaman has had to live with and revisit, personally and professionally, for more than 26 months. However, the state failed to provide evidence to prove all essential elements of this crime as is necessary to uphold this felony conviction. The testimony given by the state's witness and Mr. Seaman's actions did not meet the required standard of clear and convincing evidence of willful intent nor did the event at hand reflect the spirit and intent of this felony crime. Further,

with regard to the element of "knowledge" case law supports the reversal of this conviction. See State v Flora, 160 Wash.App. 549, 249 P.3d 188 (2011).

Mr. Seaman concedes and concurs with the prosecutor's argument in the respondent's brief that an appellant challenging the sufficiency of evidence presented at a trial admits the truth of the State's evidence presented at trial. Brief of Respondent, 6. The appellant further agrees that the standard of review, when the sufficiency of evidence is challenged, is whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990); State v. Israel, 113 Wn.App. 243, 54 P.3d 1218 (2002). With regard to the element of knowledge the statute still requires, just as it did before the 2003 amendment referenced by the prosecutor," that the defendant 'willfully' fails to stop while attempting to elude a pursuing police vehicle." State v Flora, 160 Wash.App. 549, 249 P.3d 188 (2011).

It's important to note that the only witness during this incident, other than Mr. Seaman, was the arresting officer. Further, there was no witness at all, other than the defendant, from the moment Mr. Seaman tapped his brakes and disappeared around a bend "at approximately 70 mph" until the moment Sergeant Wetzel came around that same bend to

see Mr. Seaman's vehicle pulled "off the road, facing the road, headlights on." **(RP 36 at 5, RP 55, RP 66 @ 4-11, Exhibit 7)** There is one photo (exhibit 5) that shows what appears to be some loose molding on Mr. Seaman's vehicle, molding that could have popped out anywhere along that very long drive to the Tri-Cities and back, or (quite possibly) during the hurried exit. There was no physical or demonstrative evidence introduced showing skid marks. In the words of the deputy prosecutor:

> ... don't let the fact that there's not some pictures of tire marks or the fact that there's not a camera distract you completely from what you do have.

(RP 81 at 7-9)

Further, there were no documents from the State Motor Pool, the State Patrol or any other agency entered into evidence to show billable damage of any kind to the vehicle. **(RP 2)**. The prosecution's depiction of Mr. Seaman's exit from the highway was based on assumptions and conjecture. Brief of Respondent, 11.

Attempting to Elude a Police Vehicle is a serious crime, a felony. The presumption of innocence requires the prosecution to prove beyond a reasonable doubt each element and every essential fact necessary to prove the charged crime. In re Winship 397 U.S. 358, 364 90 S.Ct. 1068 (1970); 25 L.Ed.2d 368; Fiore v. White 531 U.S. 225, 121 S.Ct. 712 (2001); Apprendi v. New Jersey, 530 U.S. 466,120 S.Ct. 2348; 147 L.Ed.2d 435 (2000).

The appellant concurs with the respondent in that the courts have used a three part test to define the required elements of attempting to elude a pursuing police vehicle. State v. Tandecki, 120 Wn. App. 303, 308-09, 84 P.3d 1262 (2004).

The Washington State Court of Appeals has repeatedly interpreted the first sentence of the eluding statute as requiring "knowledge" by the driver that there is "a pursuing police vehicle." State v. Trowbridge, 49 Wn. App. 360, 363, 742 P.2d 1254 (1987), citing State v. Stayton, 39 Wn. App. 46, 49, 691 P.2d 596 (1984); State v Flora, 160 Wn. App. 549, 249 P.3d 188; see also Mather, 28 Wn. App. at 702.

The prosecution's suggestion that an individual who taps their brakes slowing into a bend on a mountain highway is clear evidence of "knowledge" or "willful intent" is not reasonable. Isn't that what reasonable people do when approaching a bend on a highway? In this case there is sufficient evidence to support that the appellant did not know the truck chasing him was a police vehicle. It was dark. The pursuing police vehicle was a Chevy Trailblazer coming down a mountain highway exceedingly fast. **(RP, 32 at 20).** It's clear from Sergeant Wetzel's testimony he wasn't even certain that he had activated his emergency lights prior to losing sight of Mr. Seaman's vehicle around the bend. When questioned by the defense:

> Q All right. At some point in time did you lose sight of the defendant?

A Yes, I did.

Q And where did that occur?

A Well, *right after he* - - I activated my lights, I saw his taillights come on, his brake lights, they went off and he went around the curve.

(RP 36, italic's added for emphasis)

Q So it was real fast?

A Yes

(RP 59 at 5-6)

And again by the defense:

Q Okay. And is that when you activated your lights?

A Yes.

Q And where was he on the next curve?

A Well, he disappeared around the next curve.

(RP 52 at 18-21)

And when questioned by the prosecutor:

Q ... would it be accurate to say that's the curve in the road that you two were coming to as you had your lights activated?

A No, no, no. That's the curve that he ... No, no, no. That... After he came around that curve, I lost sight of him.

(RP 37 at 16-21)

The prosecution suggests the fact there is a shoulder on the road and Mr. Seaman's vehicle was off the road is evidence that he was

driving recklessly with the willful intent to elude. Brief of Respondent, 11. In the words of the deputy prosecutor:

> "... if the defendant's over on the shoulder 2 to 300 yards down the road, we're not sitting here today."

(RP at 14-16)

The State's evidence simply does not prove the element of "willful intent." Sergeant Wetzel testified that when he came around the bend, past mile marker 92, Mr. Seaman's vehicle was already off the road, clearly visible with headlights on. **(RP 66 at 4-11)**

BY MR. MCCONNELL(defense counsel):

Q So you were just coming around this curve **(reference Exhibit 7).** He was already off the road. His car was turned around, facing the road?

A Yes.

Q Before you ever got around the curve?

A Yes.

(RP 55, Exhibit 7)

Q If he pulls off that road into this turnaround and turns his car around, was his headlights facing the road?

A Yes.

Q Did he turn his headlights off or were they on?

A I believe they were on.

MR. MCCONNELL: Nothing further.

(RP 66, 4-11)

The statements above reflect testimonial evidence provided at trial. The appellant accepts and presents this evidence as truth in challenging the sufficiency of the evidence. In this case the State failed to prove that Mr. Seaman willfully failed to stop and drove recklessly "indicating a willful and wanton disregard for the lives or property of others" (pre 2003 statutory amendment) or "in a rash or heedless manner indifferent to consequences." **(post 2003 statutory amendment, RP 76 at 10-12).** The appellant is challenging the "willful intent" element. Driving "approximately 70 miles per hour" down a vacant highway 12 at 9pm followed by a hurried exit, in light of the circumstances and conditions, is not *clear and convincing* proof that Mr. Seaman attempted to elude a police vehicle.

2. THE TRIAL COURT VIOLATED MR. SEAMAN'S 14th AMMENDMENT RIGHT TO A FAIR TRAIL WHERE IT FAILED TO EXCUSE OR ACCOMMODATE TWO JURORS

The appellant concurs with the respondent in that the defense's failure to request or motion the trial court remove any jurors and the fact that there are no expressed concerns from the defense on record regarding any of the jurors bars the defendant from raising this issue for the first time on appeal.

B. CONCLUSION

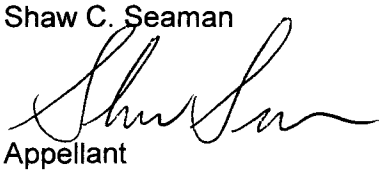
For the reasons in argument 1 above as well as those argued in Appellant's Opening Brief, Mr. Seaman respectfully requests this

Court reverse and vacate the attempting to elude a pursuing police vehicle conviction due to insufficient evidence. Alternatively, Mr. Seaman requests this Court reverse his conviction and remand for new trial due to arguments in Appellants Opening Brief, especially Ineffective Assistance of Counsel. Appellant's Opening Brief 22-32.

DATED: September 7, 2012

Respectfully submitted

Shaw C. Seaman



Appellant

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

Superior Court of Washington County of Lewis, Respondent, vs. Shaw C. Seaman, Appellant.	)))))))))	NO. 11-1-00189-4 NO. 43217-0-II CERTIFICATE OF MAILING

The undersigned Appellant sent one original and one copy of the Appellant's Reply Brief by certified mail to the Court of Appeals, Division 2, with a copy sent to, Sara Beigh, Deputy Prosecuting Attorney, by certified mail, postage pre-paid on September 8, 2012, at the Olympia post office addressed as follows:

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Dated: September 7, 2012

Signature

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